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No. 01-1600

In The
Supreme Court of the United States

JOHN UNGER, II, ET AL.,

Appellants,

v.

JOSEPH MANCHIN, III, ET AL.,

Appellees.

On Appeal From The United States District Court For The Northern District Of West Virginia

MOTION TO AFFIRM

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QUESTION PRESENTED

Appellees object to the appellants' statement of the issue presented in this case. Appellees dispute the assertions made in appellants' "question presented" that the redistricting plan at issue "violated [the] State Constitution," that there is a "violation of the Equal Protection Clause" in the plan, or that the reasons cited by the Legislature to explain any deviation from strict equality of population "were not consistently applied." A more accurate framing of the question presented is:

> Whether the West Virginia Legislature's purposes in redistricting its Senate with a maximum deviation from absolute equality of 10.92% were sufficient to satisfy the requirements of the Equal Protection Clause.

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ARGUMENT

INTRODUCTION

The jurisdictional statement has failed to identify any reason why this Court should reverse – or even grant full review to – this appeal from a straightforward and (as will be shown) eminently correct application of settled doctrine. From the limited amount of litigation (other than that relating to racial gerrymandering) that has ensued from the past two decennial redistricting cycles, one can infer that the Court's doctrines have achieved clarity and general acceptance. This case thus presents no issue of interest, let alone one of import or conflict.

In their jurisdictional statement, appellants persistently oversimplify the redistricting process and fail to appreciate that the West Virginia Legislature had multiple goals that its plan reasonably advanced but that also frequently clashed with each other, and all had to be compromised to some extent. As the district court observed,

> The legislature has adopted five rational and legitimate policy goals to justify a deviation in excess of 10%. In many respects these goals are competing and must be balanced by the legislature. We cannot conclude from the facts of this case that, in the balancing process, the legislature has failed to meet the requirement that the policies be consistent applied. Accordingly, we hold that [the Senate redistricting] is constitutional.

Appendix[1] at 13. That court consisted of three judges from West Virginia who are intimately familiar with the geopolitical configuration of the State. As demonstrated below, its decision was eminently correct.

THE WEST VIRGINIA LEGISLATURE CONSTITUTIONALLY REDISTRICTED ITS SENATE WHEN IT ADOPTED A PLAN IN WHICH ALL BUT TWO DISTRICTS WERE WITHIN +/- 5% OF IDEAL EQUALITY, IN WHICH THE AVERAGE VARIATION FROM THE IDEAL WAS 3.92%, IN WHICH THE MAXIMUM DEVIATION WAS 10.92%, AND IN WHICH THE MINIMAL INEQUALITY WAS JUSTIFIED BY THE PLAN'S PROMOTION OF LEGITIMATE AND SUBSTANTIAL PURPOSES.

A. Because the West Virginia Senate's Redistricting Plan Has a Maximum Deviation from Absolute Equality in Excess of 10%, the State Must Show that Its Plan Furthers Legitimate Interests that Justify the Deviation.

There is no disagreement among the parties regarding the applicable doctrine. Since *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court has held that the Fourteenth Amendment's Equal Protection Clause requires equality of representation in state legislatures. A state must therefore "make an honest and good-faith effort to construct its districts 'as nearly of equal population as is practicable,' but [*Reynolds* also recognized] that absolute equality was a 'practical impossibility': 'Mathematical exactness or

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[1] Citations to "Appendix" refer to the appendix that the appellants have filed with their jurisdictional statement.

precision is hardly a workable constitutional requirement.' " *Gaffney v. Cummings*, 412 U.S. 735, 743 (1973), *quoting Reynolds*, 377 U.S. at 577. Although the Court, applying Article I, § 2, of the federal constitution, has required strict equality for congressional districts within a State and has held that even *de minimis* variances must be justified, *see, e.g., Karcher v. Daggett*, 462 U.S. 725 (1983), the equal protection analysis applicable to state legislative redistricting allows for considerably greater flexibility. *E.g., Gaffney; Mahan v. Howell*, 410 U.S. 315 (1973). In such cases, the Court has, in essence, identified three levels of analysis:

> [I]t has become apparent that the larger variations from substantial equality are too great to be justified by any state interest so far suggested. . . . On the other hand, as *Mahan v. Howell* demonstrates, population deviations among districts may be sufficiently large to require justification but nonetheless be justifiable and legally sustainable. . . . [M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.

Gaffney, 412 U.S. at 744-45. After *White v. Regester*, 412 U.S. 755 (1973), concluded that a 9.9% maximum variance was so insignificant as not to require any justification, the Court ultimately offered a rough demarcation for the third analytical tier: "Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *accord Voinovich v. Quilter*, 507 U.S.

146, 161 (1993). "A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State." *Brown v. Thomson*, 462 U.S. at 842-43.

In this case, the challenged senatorial redistricting plan has a maximum deviation of 10.92%. Thus, the appellants stated a prima facie case that required the State to justify the variance. *Mahan* sets forth the proper analysis for assessing the state's justification. First, it must be determined whether the state has provided "legitimate considerations incident to the effectuation of a rational state policy[.]" 410 U.S. at 325, *quoting Reynolds*, 377 U.S. at 579. If it has, then the "inquiry becomes whether it can reasonably be said that the state policy urged by [the State] to justify the divergences in the legislative reapportionment plan . . . is, indeed, furthered by the plan adopted by the legislature[.]" 410 U.S. at 326. If it can, then the "remaining inquiry is whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits." *Id.* at 328.

In assessing whether the State can justify the Plan's deviations from equality, the degree of disparity naturally determines the weight of the State's burden. *Karcher*, 462 U.S. at 741 ("showing required to justify population deviations is flexible, depending on [*inter alia*] the size of the deviations"). Here, with a maximum variance of 10.92%, the Senate Plan barely exceeds the level that requires justification and is substantially less than the

"relatively minor deviation" of 16.4% that *Mahan* upheld.[2] 410 U.S. at 329; *see also Abate v. Mundt*, 403 U.S. 182 (1971) (sustaining 11.9% maximum deviation in redistricting plan for election of County Board of Supervisors). Thus, while appellees concede that justification is required for the population variance, the sliding scales of the applicable, flexible analysis do not impose a particularly heavy burden on the State.

As the district court and the appellants have pointed out, the Legislature set forth five criteria in West Virginia Code 1-2-1(c) that it used to create its new senatorial districts. Additional purposes can also be inferred from content of the plan. In brief, the Legislature sought to achieve population equality to the extent consistent with the attainment of other legitimate and traditional redistricting goals. Those other goals are: maintaining as many whole counties as feasible; creating compact and contiguous districts; respecting communities of interest; and avoiding radical changes to the pre-existing district structure. The plan in § 1-2-1 simultaneously promotes yet compromises all of those interests, and the issue that permeated consideration of each of the interests was whether to keep Kanawha County whole and retain its two superimposed districts.

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[2] Indeed, the maximum deviation was *at least* 16.4% and may well have been as large as 23.6%. 410 U.S. at 336-38 (Brennan, J., dissenting and concurring).

B. In Enacting the Senate Plan and to the Extent Consistent with Population Equality, the Legislature Sought to Adhere to the State Constitutional Requirements that Senatorial Districts Should Be Compact, Contiguous, and Consist of Whole Counties.

Article VI, § 4 of the West Virginia Constitution requires that senatorial districts must be "compact, formed of contiguous territory, [and] bounded by county lines[.]" In enacting § 1-2-1, the Legislature sought to advance those goals to the extent they were consistent with maintaining population equality. The requirements of compactness and contiguity are clearly legitimate goals, *e.g.*, *West Virginia Civil Liberties Union v. Rockefeller*, 336 F. Supp. 395 (S.D.W.V. 1972), as both serve to guard against gerrymanders and other forms of discrimination. *E.g., Karcher,* 462 U.S. at 755-58 (Stevens, J., concurring). For extreme illustrations, *see Shaw v. Hunt*, 517 U.S. 899 (1996), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). An examination of the map of § 1-2-1's Senate Districts (*see* Appendix at 51) reveals that the districts are contiguous and that the Legislature largely succeeded in creating compact districts, at least to the extent feasible in a state with two panhandles and vast stretches of sparsely populated areas. *See Stone v. Hechler*, 782 F. Supp. 1116, 1127 & n.19 (N.D.W.V. 1992) (3-judge court).

Regarding the interest in keeping counties whole, this Court has specifically held that respecting local government boundaries can justify deviations from equality in excess of 10%, *Voinovich*, 507 U.S. at 161-62; *Mahan v. Howell*, 410 U.S. at 328, and in *Mahan,* the Court concluded as well that the interest was sufficient to sustain a

plan with a significantly larger deviation from the norm than that imposed by § 1-2-1. Thus, there is no questioning the validity and weight of the legislative purpose of preserving whole counties when possible. The only question, then, is whether "it can reasonably be said" that the Legislature's Senate Plan furthers its interest in respecting county lines. *Mahan v. Howell*, 410 U.S. at 326 & 328.

West Virginia remained steadfast to the Article VI "bounded by county lines" requirement throughout its history up to and including the 1964 reapportionment, which remained in place until 1977. Beginning with the 1977 reapportionment,[3] and in each one since, the Legislature has found and declared "that it is not possible to divide the state into senatorial districts so as to achieve equality of population as near as is practicable as required by the United States supreme court and other federal courts and at the same time adhere to [Article VI, § 4] of the West Virginia Constitution."[4] In each of those Acts, the Legislature also recited the five findings set forth in West Virginia Code 1-2-1(c)(1)-(5), which (among other things) reaffirm its adherence to the "equality of population

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[3] The redistricting bill was passed during the 1976 legislative session but did not take effect until January 1, 1977. 1976 ACTS OF THE LEGISLATURE OF WEST VIRGINIA 345 (Regular Session). The Legislature had enacted a redistricting plan in 1971, but that was vetoed by the Governor. *See Goines v. Rockefeller*, 338 F. Supp. 1189 (S.D.W.V. 1972).

[4] 1976 ACTS OF THE LEGISLATURE OF WEST VIRGINIA 347 (Regular Session). For subsequent redistricting provisions repeating that language, *see* H.B. 511, 2001 ACTS OF THE LEGISLATURE (now § 1-2-1); 1991 ACTS OF THE LEGISLATURE OF WEST VIRGINIA 307 (3rd Extraordinary Session); 1982 ACTS OF THE LEGISLATURE OF WEST VIRGINIA 542 (Regular Session).

concept, while at the same time recognizing that from the formation of this state in the year [1863], each constitution of West Virginia and the statutes enacted by the Legislature have recognized political subdivision lines and many functions, policies and programs of government have been implemented along political subdivision lines" and that the enacted plan had "[d]eviated from the long-established state policy [of creating districts bounded by county lines] by crossing county lines only when necessary to ensure that all senatorial districts were formed of contiguous territory or when adherence to county lines produced unacceptable population inequalities and only to the extent necessary in order to maintain contiguity of territory and to achieve acceptable equality of population[.]"[5] Pursuant to that "long established state policy" and in respect for Article VI, § 4, the Legislature has continued to maintain districts that largely consist of whole counties and has, for the most part, crossed county lines only at the edges to ensure compliance with federal law. Thus, for example, § 1-2-1 leaves 44 of the State's 55 counties whole. Appendix at 51. Although only 3 of the districts are bounded entirely by county lines, *id.*, scrutiny of the districting map reveals that an overwhelming proportion of senate district lines, in linear terms, coincide with county lines.

Indeed, the shape of the State and its distribution of population made the whole county goal unachievable. No plan was put forward that included only bounded-by

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[5] H.B. 511; 1976 ACTS OF THE LEGISLATURE OF WEST VIRGINIA 348 (Regular Session). 1991 ACTS OF THE LEGISLATURE OF WEST VIRGINIA 308 (3rd Extraordinary Session); 1982 ACTS OF THE LEGISLATURE OF WEST VIRGINIA 543 (Regular Session).

county-line districts, and none is practical. To understand that, one need not look any further than the Eastern Panhandle. Jefferson County, with a population of 42,000 could not, by itself support a district, but when Berkeley County is added onto it – and Berkeley is the only county that can be added to it – then the population total exceeds 117,000, which is more than 10% above the ideal district of 106,374. Appendix at 51, 68-69. To create a double district (as was done with districts 8 and 17) would require reaching deeply into the sparsely populated counties of the Eastern Highlands and would create an enormously large district with two distinctly different communities of interest. (That is, one facing the threat of urban sprawl problems and one sitting in sparsely populated country.) Moreover, the rural counties could legitimately object to their inclusion with the more densely populated Jefferson and Berkeley Counties; combining the counties of the current 15th and 16th districts into two superimposed districts would make it likely that the districts would end up with four senators from the more populous Panhandle and none from the mountain counties. An additional example of the impracticality of retaining only whole county districts can be found in the 5th district, where Cabell County, with 96,000 people, cannot by itself support a senatorial district, but adding to it anyone of its surrounding four counties would put it way over an acceptable deviation. (The smallest population of any adjoining county is Lincoln, and it has 22,000 people.)

Appellants (Jurisdictional Statement at 4, 15-16) and the district court (Appendix at 12) have appropriately observed that the Legislature extended the 2nd and 15th districts across county lines to add minute portions of, respectively, Ohio and Upshur Counties and that these

boundary crossings were not necessary to achieve population equality or (apparently) to advance any other stated purpose. These transgressions, which might have state constitutional significance, have only minimal federal constitutional relevance. They did not create or contribute to any inequality that exceeded the 10% window. Their only significance is that the Plan created by § 1-2-1 has 44 whole counties instead of 46. The district court rightly concluded that those two exceptions to the Legislature's design to cross county lines only when necessary to achieve equality of population did not significantly impeach the State's reliance on that goal. Appendix at 12-13.

In sum, the Legislature retained whole counties, whenever practicable, in all but two instances. The State is not required to adhere rigidly to a policy in order to claim it as a valid goal that will justify modest population deviations. *Mahan v. Howell*, 410 U.S. at 327-28 & n.9; *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022 (D. Md. 1994) (3-judge court). Overall, the Legislature has left forty-four counties whole and at least three others (Ohio, Upshur, and Wyoming) with only minimal intrusions into their borders. The appellants' advocated plan comes out about the same, as it includes eight split counties. Appendix at 71. Accordingly, § 1-2-1 "may reasonably be said to advance the rational state policy of respecting the boundaries of political subdivisions." *Mahan v. Howell*, 401 U.S. at 328.

C. The Legislature Had Independent, Legitimate, and Overriding Reasons for Maintaining Kanawha County's Two Superimposed, Whole County Districts.

Most notably, and most importantly for the present case, the Legislature adhered to its respect for county lines in defining the 8th and 17th districts. It was that decision that created the possibility for this lawsuit, because all of the other senatorial districts are less than 5% from the ideal, and without at least one district over 5%, there could not be a 10% variance to state even the barest prima facie case. The Kanawha districts are just beyond the 5% line, at 5.92% under the norm. The Legislature, however, had compelling reasons for retaining Districts 8 and 17 as whole county districts.

The Legislature's dilemma regarding Kanawha County derived from that part of Article VI, § 4 of the West Virginia Constitution which provides for each district to elect two senators, "but, where the district is composed of more than one county, both shall not be chosen from the same county." This provision created particular problems as applied to Kanawha County. If the Legislature had done as the appellants have urged and added Roane County on to Kanawha to create a double district with a population 215,519, the deviation from equality would indeed have be limited to 1.3%. Appendix at 71. That move, however, would also have meant – as required by Article VI, § 4 – that two of the four senators from the district would have to be Roane County residents. Thus, Roane County, with 15,000 people, would have two residential senators, and Kanawha County, with 200,000 people, would get two residential senators. Appendix at 55-56, 70. While that

result would not create any federal constitutional problems, a rational legislator could certainly conclude that such an arrangement was to be avoided. Not only would it be a case of the tail wagging the dog, but the local interests and concerns of sparsely populated Roane County are very different from those confronting Kanawha County. Indeed, Roane Countians would not likely be thrilled by a system in which the election of its Senators will be determined by the overwhelmingly dominant numbers of citizens living in the City of Charleston and its suburbs.

Other options also had serious downsides. Splitting Kanawha County into a district roughly equivalent to the ideal and then attaching its remainder to a small county like Roane or Clay would have reduced even further the number of districts "bounded by county lines" and would have created the same problems as creating the double district with Roane County. That is, that proposal would also cost Kanawha County a resident senator and would combine very different communities of interest. If the county's voters were split evenly between two districts, with approximately one hundred thousand in each, then Kanawha County would be down to two resident senators and the attached counties contributing 6,000 people to each of the two districts would supply the other two senators. Again, a rational legislator could find that result unfair and undesirable. Further problems would arise if the County were carved into additional units and attached to three or more of any of the nine counties or five senate districts that abut Kanawha. Regardless of the number of Kanawha residents who might be elected to the Senate in that scenario, it would create political chaos for county officials who would have to deal with multiple sets of senators. And *none* of those senators could provide the

same kind and degree of attention to Kanawha County that it currently receives from all four of its Senate representatives.

Rather than force the State's largest county – with more than twice the population of the next largest – to surrender one or more of its residential senators and to cause the county to lose the other advantages of whole county status because of a shortfall in population that was only about 450 persons per senator shy of the +/- 5% window, the Legislature determined that the additional slight deviation from ideal equality was justified.

Appellants emphasize two other legislative decisions as examples of legislative inconstancy to its stated goals and of preferential treatment for Kanawha County. Each, however, is readily distinguishable and, in fact, reflects adherence to the criteria of § 1-2-1. The first example contrasts the treatment of Kanawha County with that rendered to the 5th district, which consists of Cabell County and a small portion of Wayne County. The Cabell-Wayne situation differs from Kanawha County for two reasons. First, Cabell County falls appreciably further from the ideal than does Kanawha County. With a population of about 96,000, Appendix at 56, Cabell County would fall 9.4% short of the population needed for the ideal senate district. That variance, the Legislature concluded, was simply too great to justify a separate district. Second, the City of Huntington straddles Cabell and Wayne Counties, and the piece of Wayne that was added to the 5th district permitted the entire City of Huntington to be within the same senatorial district. Thus, Cabell County must share a senator with Wayne County, but the latter will be a Huntington resident, and the entire district would comprise one distinct community of interest.

The second example that the appellants point to actually illustrates the necessity for having to compromise among goals. At page 17 of their jurisdictional statement, appellants ridicule the Legislature for its failure to adhere to its "community of interest" criterion in creating the 15th district.[6] According to appellants, the 15th district extends over nine counties, stretches 200 miles, and combines the very disparate interests of rural mountainous counties with Eastern Panhandle Counties that are part of the Washington-Baltimore Metropolitan Statistical Area. That is all true, and all of it is unavoidable. As previously explained, the population growth in the Eastern Panhandle meant that it had to be split. Jefferson County has 42,000 people and adjoins only Berkeley County. Appendix at 51 & 70. Therefore, Jefferson had to be attached to Berkeley. But Berkeley has 76,000 people. Appendix at 68-70. Hence, to stay within +/- 5% of ideal population, an area of Berkeley County comprising at least 4,700 people had to be excised from the 16th district. And that population could only be added to the 15th district because Berkeley touches only one other county, Morgan County, which in turn touches only one other county, Hampshire County. Once into Hampshire County, however, the district is already into the rural stretches of the Potomac Highlands and, to pick up sufficient population to satisfy equal protection standards, it would then have to continue either southward into sparsely populated stretches or eastward into areas that are also sparsely populated. In either direction, the resulting district would be very large; to pick

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[6] The district court also expressed bafflement about the size and composition of the 15th district. Appendix at 12. The text offers an explanation that should relieve any bafflement.

up the necessary 106,000 or so people in that region requires a very large catchment area. Thus, the Legislature had no alternative but to append the western end of Berkeley County and all of Morgan County to some very large piece of rural highlands.

The appellants' examples and their other arguments do not diminish the fact that retaining the 8th and 17th districts as single-county (Kanawha) districts served important legislative purposes in respecting county boundaries, communities of interest, compactness, and continuity. In addition, the retention also preserved pre-existing districts (*see* Part D, *infra*) and came very close to meeting the goal of equality of population. To the minimal extent that latter goal was compromised, the deviation was justified by legitimate legislative concerns in avoiding the creation of a political anomaly that Article VI, § 4 of the West Virginia Constitution would otherwise have imposed.

D. The Legislature Had a Legitimate and Important Interest in Preserving the Core of Pre-Existing Districts, and the Senate Plan Substantially Furthered that Interest.

Although the district court found it unnecessary to go beyond the criteria stated in § 1-2-1 to sustain the redistricting, *see* Appendix at 9-10, a comparison of the new plan with the old, makes clear that an additional purpose was to preserve the cores of pre-existing districts, a clearly legitimate interest that can justify population variances. *E.g.*, *Karcher*, 462 U.S. at 740; *Marylanders for FairRepresentation v. Schaefer*, 849 F. Supp. 1022, 1037 (D. Md. 1994) (3-judge court); *Stone v. Hechler*, 782

F. Supp. 1116, 1126 (N.D.W.V. 1992) (3-judge court). The Legislature's desire to retain as much of the basic structure as it could was not only rational but promoted critically important concerns. Stability and continuity in districts reduce voter confusion and, more importantly, promote voters' familiarity with their representatives. Senators can likewise continue to represent the voters and the local governments with whom they have grown familiar. These political relationships have real value in facilitating communication and understanding between constituents and their legislators.

Avoiding major district shifts is particularly important in the Senate because only half of the West Virginia Senate is elected with each election cycle. Shuffling counties and territory from one district to another creates the risk that some communities will be left for nearly three years with only one senator (or possibly none) residing within their districts. Section 1-2-1 was crafted to minimize that problem; only one senator's county was moved into a different district. Finally, preserving the core of pre-existing districts helps to avoid battles between incumbents, an interest which has been recognized as a legitimate redistricting concern. *E.g., Karcher*, 462 U.S. at 740. Such occasions not only create the risk, described above, of leaving areas underrepresented by resident senators but they also threaten legislative comity and collegiality and political stability.

Promoting that interest explains much of the deviation from absolute equality in the senate plan. Obviously, that goal was best served by leaving the boundaries of the 8th and 17th districts unchanged. In addition, significant population shifts from the southern counties and into the eastern counties strained the Legislature's ability to

preserve the basic identity of the old districts. It managed to accomplish that goal only by using most of the +/- 5% window in most districts and by exceeding it slightly in the 8th and 17th districts.

E. The Senate Plan Enacted in Section 1-2-1 Appropriately Balances the Competing Interests Confronting the Legislature.

Undoubtedly a redistricting plan could have been devised that provided for greater equality, or that better served the interest in preserving pre-existing districts, or that avoided all incumbent battles, or that better respected county lines, or that created more compact districts. But the Legislature settled on the plan that it believed best balanced those sometimes competing interests and that, in the end, reasonably promoted all of them. Redistricting and reapportionment are quintessentially political; they cannot be accomplished without give and take and compromise. "The apportionment task, dealing as it must with 'fundamental choices about the nature of representation,' *Burns v. Richardson*, 384 U.S. [73,] 92 [(1966)], is primarily a political and legislative process. *Reynolds v. Sims*, 377 U.S. at 586." *Gaffney*, 412 U.S. at 749. This Court has consistently recognized that legislatures must be permitted to accommodate multiple interests in crafting their redistricting plans. *E.g.*, *White v. Regester*, 412 U.S. at 764 n.8; *Mahan v. Howell*, 410 U.S. at 327-28 & n.9.

Based on the foregoing discussion, the West Virginia Legislature's "plan for apportionment of the [Senate] may reasonably be said to advance the rational state polic[ies] of respecting the boundaries of political subdivisions[,]" of promoting compactness, of honoring communities of

interest, of maintaining Kanawha County as two districts bounded by its county lines, of preserving the cores of pre-existing districts, and of avoiding incumbent contests. *Mahan v. Howell*, 410 U.S. at 328. Thus, "[t]he remaining inquiry is whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits." *Id.*

F. The Minor Population Disparities Resulting from the Legislature's Efforts to Further the Above-Identified State Interests Do Not Exceed Constitutional Limits.

"Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not." *Mahan v. Howell*, 410 U.S. at 329. Despite the frequent lack of certainty in making the determination about whether the State has justified some departure from perfect equality, the above discussion renders this "remaining inquiry" somewhat anti-climatic, given the importance and legitimacy of the State's justifications and the degree to which § 1-2-1 furthers them balanced against a minor population deviation. Not only is the Senate Plan's 10.92% variance barely over the 10% line that makes out a prima facie case and significantly less than the "relatively minor" 16.4%[7] sustained under similar (and arguably

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[7] The Virginia House plan in *Mahan* had 52 districts and "nine [17.3%] exceeded a 6% variance from the ideal." 410 U.S. at 319. By contrast, none of the districts in § 1-2-1's Plan exceed 6%, and only two (or 11.86%) – the two superimposed on Kanawha County – exceed 5%.

lesser) justification in *Mahan*, but it is way below any level that this Court has thus far invalidated in a legislatively-drawn state or local redistricting plan.[8] Indeed, appellees are unaware of any case decided by any Court since *Mahan* in which a redistricting with a maximum variance under 11% was overturned, at least where the State offered some legitimate justification for the variance.[9] Meanwhile, at least one other court – besides the district court in this case – has concluded that the state's interests in preserving county lines and the cores of prior districts justify a maximum variation around 11%. *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1036-37 (D. Md. 1994) (3-judge court) (upholding a plan with a maximum deviation of 10.67%).[10]

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[8] Although discounting the value of bottom line comparisons, the Court in *Mahan* nevertheless observed that, "The most stringent mathematical standard that has heretofore been imposed upon an apportionment plan for a state legislature by this Court was enunciated in *Swann v. Adams*, 385 U.S. 440 (1967), where a scheme having a maximum deviation of 26% was disapproved." 410 U.S. at 328. That statement remains accurate. *See also* n.2, *supra*; *but cf. Langsdon v. Millsaps*, 836 F. Supp. 447 (W.D. Tenn. 1993), *summarily aff'd sub. nom. Millsaps v. Langsdon*, 510 U.S. 1160 (1994) (mem.). Of course, the Court has held court-drawn plans to higher standards and invalidated them at levels lower than *Swann*. *See Connor v. Finch*, 431 U.S. 407 (1977); *Chapman v. Meier*, 420 U.S. 1 (1975).

[9] In *Smith v. Idaho Commission of Redistricting*, 38 P.3d 121 (Idaho 2001), the Idaho Supreme Court struck down a legislative scheme having a 10.69% maximum variance. The Court stated, however, that "the State has not presented *any* evidence that the reason(s) for the population disparity result from advancement of a rational state policy." *Id.* at 124 (emphasis in the original).

[10] To the extent that § 1-2-1 creates a minor geographical inequality between the southwestern counties and the Eastern Panhandle, the Legislature's plan for redistricting its House of Delegates greatly mitigates that inequality by removing one delegate

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Taking into account, then, the weight and applicability of the Legislature's legitimate interests and the minimal nature of the deviation from perfect equality, the result necessarily follows that the redistricting plan in West Virginia Code 1-2-1 is constitutional.

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each from McDowell County and Kanawha County and transplanting them to the Eastern Panhandle. W. Va. Code 1-2-2. The Plan also underpopulated each of the Eastern Panhandle's ten districts, with variances ranging between 2.43 and 5.00% below the ideal. Although a substantial deviation in one house of a bicameral legislature cannot, for equal protection purposes, be justified solely by an offset in the other house, this Court has made clear that it is at least appropriate to consider a redistricting plan as a whole. *Brown v. Thomson*, 462 U.S. at 862 n.9. As in this case, where the deviations from equality are minor to begin with, the countervailing effect of the House Plan in the 2001 redistricting Act in underpopulating the Eastern Panhandle districts defeats any hint of geographical bias by the Legislature.

CONCLUSION

The district court in this case correctly applied settled law. This Court should therefore affirm that decision.

Respectfully submitted,

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